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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEVIN REGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-0607-CR-606
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE CASS SUPERIOR COURT  
The Honorable Thomas C. Perrone, Judge  
Cause No. 09D01-0506-FA-3

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**May 9, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Kevin Regan appeals his conviction for Dealing in Methamphetamine, as a ClassA felony, following a jury trial. He presents three issues for our review:

1. Whether the trial court erred when it denied his motion to suppress.
2. Whether the trial court abused its discretion when it admitted into evidence the search warrant without first giving a limiting admonishment.
3. Whether he was denied the effective assistance of trial counsel when his counsel did not make a contemporaneous objection to the introduction of the challenged evidence.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On June 16, 2005, an officer arrested Regan for speeding in Tippecanoe County. Regan gave the officer permission to search his vehicle, whereupon the officer found between 500 to 600 pills containing pseudoephedrine, an ingredient used in the manufacture of methamphetamine. When Regan informed the officers that he resided in Cass County, one of the officers, Detective Hetrick, contacted Detective Jim Klepinger of the Cass County Drug Task Force. After learning that Regan had so much pseudoephedrine in his possession, Detective Klepinger contacted Detective Jeffrey Schnepf, also of the Cass County Drug Task Force, to ask whether he had any information on Regan.

Detective Schnepf reported that in the Fall of 2005 Regan was involved in the theft of anhydrous ammonia and the manufacture of methamphetamine. Further, Detective Schnepf reported that at some time during the past six months he had

investigated reports of an ammonia or chemical odor emanating from the area near Regan's residence at 426 Minor Street in Logansport, but he could not pinpoint the origin of the odor at that time. Finally, Detective Klepinger interviewed people "in a position to observe odors and traffic flows" at that residence, who reported "chemical odors coming from that home on a regular basis" and "high traffic volume late into the night, into the early morning hours on a weekly basis." Defendant's Exhibit A at 5.

Following a probable cause hearing, Detective Klepinger obtained a search warrant for Regan's residence. During the search, Detective Klepinger found a triple-beam scale, several baggies of powder that tested positive for methamphetamine, and a burnt piece of foil used for smoking methamphetamine. The State arrested Regan and charged him with dealing in methamphetamine, as a Class A felony.

Prior to trial, Regan filed a motion to suppress the evidence, which the trial court denied following a hearing. Regan requested that the trial court acknowledge a continuing objection to the introduction of the evidence obtained pursuant to the search warrant, and the trial court agreed. At trial, the State introduced into evidence the items found in Regan's residence as well as the search warrant permitting Detective Klepinger to search his residence. The jury found Regan guilty of dealing in methamphetamine, as a Class A felony, and possession of methamphetamine, as a Class C felony, a lesser-included offense. The trial court entered judgment on the Class A felony and sentenced Regan to twenty-two years, with two years suspended. This appeal ensued.

## DISCUSSION AND DECISION

### Issue One: Probable Cause

Regan first contends that the trial court erred in denying his motion to suppress evidence of methamphetamine use collected at his home pursuant to the search warrant. We examine the factual findings underlying the trial court's denial of the motion to suppress for clear error and review de novo the ultimate questions of whether probable cause exists and the Fourth Amendment has been violated. See Myers v. State, 839 N.E.2d 1146, 1150 (Ind. 2005). Probable cause exists if there is a fair probability that contraband or evidence of a crime will be found in a particular place. See Love v. State, 842 N.E.2d 420, 425-26 (Ind. Ct. App. 2006) (quoting Merritt v. State, 803 N.E.2d 257, 260 (Ind. Ct. App. 2004)). We will uphold a judicial determination of probable cause if there is a substantial basis for concluding that a search would uncover evidence of wrongdoing. See id. Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. Id. (quoting Merritt, 803 N.E.2d at 260).

Regan maintains that the admission of the evidence collected at his home violated his Fourth Amendment rights against unreasonable search and seizure. Specifically, Regan argues that the police lacked probable cause to obtain a search warrant for his residence. The State responds that the trial court's finding of probable cause is supported by the following evidence, elicited from the testimonies of detectives Klepinger and Schnepp during the probable cause hearing: (1) ninety minutes prior to the hearing, Detective Klepinger received a phone call from Detective Hetrick that 500-600 cold pills

containing pseudoephedrine were found in Regan's vehicle; (2) citizens living nearby Regan's residence had complained of chemical odors and high traffic volume around Regan's home; (3) "in the past six months," Detective Schnepf had independently perceived a strong odor of anhydrous ammonia in the area of Regan's home, Appellee's Brief at 12; and (4) in the Fall of 2005, Detective Schnepf received information that Regan was involved in the manufacture of methamphetamine and the theft of anhydrous ammonia.

Although the State lists four supposedly salient facts contributing to the court's finding of probable cause, we need look no further than the first fact listed. As the State notes, "[t]his fact alone, that [Regan] possessed a large quantity of pseudoephedrine, a precursor for the illegal manufacture of methamphetamine and the over-the-counter sale of which is strictly controlled, establishes sufficient probable cause to support a search warrant."<sup>1</sup> Id. at 9-10. The possession of pseudoephedrine is strictly controlled under Indiana law.<sup>2</sup> See Ind. Code § 35-48-4-14.5(b) (2004) (possession of more than ten grams of pseudoephedrine is a Class D felony).

Here, at the traffic stop officers found Regan to be in possession of 500-600 pills containing pseudoephedrine. At no point since then has Regan provided a legitimate reason for his possession of such a large quantity of cold pills. However, one reasonable inference is that Regan was using the pills in the manufacture of methamphetamine. Thus, Regan's possession of such a large number of cold pills provided authorities with a

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<sup>1</sup> Regan points out that, at the hearing on his motion to suppress, the State informed the trial court that it did not believe this factor by itself was sufficient to support probable cause. However, the court did not state whether it agreed with the State, and the State clearly thinks otherwise on appeal.

<sup>2</sup> It is unclear exactly how much pseudoephedrine Regan possessed, but he does not dispute the conclusion that it was an amount sufficient to use in the manufacture of methamphetamine.

substantial basis to conclude that a search of his home would uncover evidence of wrongdoing. See Love, 842 N.E.2d at 425-26. That is, there existed “a fair probability that contraband or evidence of a crime will be found in a particular place.” See id. Hence, we hold that there existed probable cause to support the search warrant for Regan’s private residence.

Still, Regan maintains that the pills alone are insufficient to find probable cause. Specifically, Regan asserts that there was no evidence of the “direction the car was traveling when stopped,” Appellant’s Brief at 6, that he was “some fifteen to twenty miles from Logansport” at the time he was stopped, id. at 9, and that there was no “‘fresh’ information relating to [his] home,” id. We are not persuaded by Regan’s arguments. First, the direction of Regan’s travel at the time of the traffic stop is irrelevant; one’s direction at any given time says nothing about one’s ultimate destination.

Further, the fact that Regan was found in possession of the pills about ninety minutes before the probable cause hearing negates his assertions regarding distance and “fresh information.” In support of both of those arguments, Regan cites Jaggers v. State, 687 N.E.2d 180 (Ind. 1997), in which our supreme court reversed a probable cause determination. In Jaggers, the determination of probable cause was based exclusively on an anonymous informant’s statements “that Jaggers was cultivating and trafficking marijuana in his house and also controlled . . . off-site plots [about two and six miles from his house].” Id. at 182. In reversing, our supreme court noted that the uncorroborated hearsay demonstrated no link between the off-site marijuana plots and Jaggers. Here, however, Regan was found in possession of the pills. Thus, Jaggers is inapposite. As

Regan was in possession, we are not persuaded that there was no nexus between the pseudoephedrine and his residence some twenty miles away. And since only about ninety minutes passed between the traffic stop and the probable cause hearing, we are also not persuaded that there was no fresh information supporting the determination of probable cause.

### **Issue Two: Admonishment**

Regan also contends that the trial court abused its discretion when it did not properly admonish the jury after admitting the search warrant into evidence at trial. Specifically, Regan argues that the trial court should have admonished the jury that the warrant could only be used for the limited purpose of showing the authority by which the officers searched Regan's home. But Regan has waived that issue for our review.

We review a trial court's decision regarding admonishments to the jury under an abuse of discretion standard. Gibson v. State, 702 N.E.2d 707, 710 (Ind. 1998), cert. denied, 531 U.S. 863 (2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misrepresented the law. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). The decision to admonish the jury is within the trial court's discretion and is reversible only where the defendant demonstrates that the trial court's failure to admonish the jury placed the defendant in a position of grave peril. Gibson, 702 N.E.2d at 710. A search warrant may be offered into evidence to show the basis for an officer's search where the trial court includes an "admonishment to the jury that the search warrant [is] admitted only for the purpose of showing the authority of the officers in making the search . . . ." See Clark v. State, 400 N.E.2d 172, 175 (Ind. Ct. App. 1980).

Nevertheless, the introduction of inadmissible evidence will not constitute reversible error where it is merely cumulative. Id. at 175.

At trial, Regan asked the court “to admonish the jury that this [is] not evidence necessarily . . . it’s just evidence that the judge found . . . .” Transcript Volume II at 56.

In response, the trial court stated:

Will give it [sic] . . . ladies and gentlemen just so . . . [the search warrant is] admitted into evidence for your consideration. The attorneys will clearly have an opportunity to argue on how you will want to interpret that . . . when the time comes, but it is evidence at this moment. You are allowed to examine it.

Id. Regan now contends for the first time on appeal that the trial court had a duty to admonish the jury that the warrant should only be considered for the limited purpose of showing the basis of authority upon which law enforcement entered his home. Because Regan asserts a different argument supporting his request for admonishment on appeal than he asserted at trial, the issue is waived. See Yater v. Hancock County Bd. of Health, 677 N.E.2d 526, 530 (Ind. Ct. App. 1997) (noting party may not raise issue or argue different theory of recovery on appeal that was not presented first to the trial court).

Waiver notwithstanding, we address whether admission of the search warrant into evidence constitutes reversible error. Errors in the admission of evidence are harmless when the evidence is merely cumulative of evidence admitted elsewhere. Hollen v. State, 740 N.E.2d 149, 154 (Ind. Ct. App. 2000), adopted by 761 N.E.2d 398 (Ind. 2002). At trial, Detective Klepinger testified to the information he gathered leading up to the probable cause hearing, as well as what occurred when officers executed the search warrant. Thus, any error in admitting the search warrant without a limiting admonishment was harmless.



### **Issue Three: Ineffective Assistance of Counsel**

Regan's final contention is that his trial counsel rendered ineffective assistance. He argues that the evidence found in his home was obtained by a defective warrant, but asserts that he cannot raise this issue on appeal because trial counsel did not object to admission of the evidence and thus did not preserve his right to appeal his argument for suppression. We cannot agree.

In order to prevail on a claim for ineffective assistance of counsel, a defendant must show that (i) defense counsel's representation fell below an objective standard of reasonableness and (ii) there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's inadequate representation. Troutman v. State, 730 N.E.2d 149, 154 (Ind. 2000). We start with the presumption that trial counsel's performance was adequate. Id. Moreover, poor trial strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. Id.

At trial, Regan's counsel was twice asked whether he had an objection to the evidence obtained in his home. Both times his trial counsel did not assert an objection. Regan now contends that he was denied effective assistance of counsel because his counsel failed to preserve his ability to contest that evidence on appeal. He asserts that the issue is not simply the ruling that the trial court may make, but the failure to make the objection which constitutes ineffective assistance of counsel. Regan claims that the failure to object at that time has prevented him from making later in-trial or post-trial motions reasserting his claim of inadmissibility.

However, as we have already mentioned, Regan's counsel moved to suppress the evidence on the ground that there was no probable cause for the search warrant. After a

hearing, the court denied that motion. Regan's trial counsel then requested that the record show a continuing objection to the admission of the evidence on the grounds set out in the motion to suppress, stating:

I will ask you Judge . . . there's gonna [sic] be an objection to any evidence that's introduced as a result of the search of the home based on [the motion to suppress] . . . I'm just gonna [sic] you know raise my hand to indicate that the amend . . . the Fourth Amendment, in Article 1, Section 11 and then show the continuing objection.

Transcript Vol. II at 24. The trial court permitted the record to reflect that continuing objection.

Where a defendant makes a continuing objection to the admission of evidence, that objection is sufficient to preserve the issue for appellate review. See Porter v. State, 397 N.E.2d 269, 272 (Ind. 1979); see also Kail v. State, 528 N.E.2d 799, 804-05 (Ind. Ct. App. 1988), trans. denied; Sullivan v. State, 748 N.E.2d 861, 864 (Ind. Ct. App. 2001). Again, Regan's trial counsel made a continuing objection to the admission of evidence found pursuant to the search warrant and the trial court permitted the record to show that objection. This was sufficient to preserve the issue on appeal. As such, Regan cannot show that he was denied the effective assistance of trial counsel.

Affirmed.

RILEY, J., and BARNES, J., concur.